

Appeal of Robert M. and Jean W. Brown

The rule, however, has been weakened in recent years by exceptions both in the Tax Court and other federal courts, exceptions announced in decisions which stressed the point that neither the statute nor the regulations specifically defined the time or manner of making the election. (John F. Bayley, 35 T.C. 288; Jack Farber, 36 T.C. 1142, aff'd on other grounds, 312 F.2d 729, cert. denied, 374 U.S. 828 (10 L. Ed. 2d 1051); Nathan C. Spivey, 40 T.C. 1051; Hornberger v. Commissioner, 289 F.2d 602; Nunn v. Gray, 196 F. Supp. 305.)

Among the cited cases in which exceptions were made, the Hornberger decision bears a close resemblance to appellants' situation. That case involved a sale in which part of the purchase price was received in cash at the time of the transaction. The taxpayers employed a firm of accountants to prepare their returns and directed them to treat the gain on the sale under the installment method. Due to an error by the accounting firm, the sale was not reported at all in the returns which were filed for that year. Holding that the taxpayers could nevertheless use the installment method, the court stated that:

If a failure to report an income producing sale is excusable and may be corrected without penalty for all other purposes of the income tax laws, we perceive no reason why, if reported or claimed as an installment sale while the year of sale is still open to adjustment under the statute and if it has not been treated in an inconsistent manner, this should not entitle the taxpayer to installment treatment of the sale.

Although the facts surrounding the omission of a report of the sale in appellants' original, timely return have not been specified in full detail, respondent does not contend that appellants were negligent and it is our impression that they were not. Like the circumstances in Hornberger, the omission here was due to an oversight by the accountant who prepared the return. The fact that appellants filed an amended return correcting the inadvertent omission within two months after the original return was timely filed demonstrates that there was an honest error and that appellants acted in good faith. So far as we can ascertain, appellants neither sought nor obtained any advantage by the omission.

Upon the particular facts of this case, we conclude that appellants are entitled to use the installment method of reporting their gain from the sale in question.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code that the action of the Franchise Tax Board on the protest of Robert M. and Jean W. Brown against a proposed assessment of additional personal income tax in the amount of \$391.11 for the year 1954, be and the same is hereby reversed.

Appeal of Robert M. and dean W. Brown

Done at Sacramento, California, this 10th day of December, 1963,
by the State Board of Equalization,

John W. Lynch, Chairman

George R. Reilly, Member

Paul R. Leake, Member

Richard Nevins, Member

_____, Member

ATTEST: H.F. Freeman, Secretary